

12-889

TAX TYPE: INCOME TAX

TAX YEARS: 2004, 2005, 2006 and 2009

DATE SIGNED: 5-30-2014

COMMISSIONERS: D. DIXON, M. CRAGUN, R. PERO

EXCUSED: B. JOHNSON

GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

TAXPAYER-1 and TAXPAYER-2,

Petitioners,

vs.

AUDITING DIVISION OF THE
UTAH STATE TAX COMMISSION,

Respondent.

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND FINAL DECISION**

Appeal No. 12-889

Account No. #####

Tax Type: Income Tax

Tax Years: 2004, 2005, 2006 and 2009

Judge: Phan

Presiding:

Michael Cragun, Commissioner
Jane Phan, Administrative Judge

Appearances:

For Petitioner: TAXPAYER-2

For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney General
RESPONDENT, Manager, Income Tax Auditing

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on February 20, 2014, in accordance with Utah Code §59-1-501 and §63G-4-201 et seq. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The Notices of Deficiency and Estimated Income Tax had been issued on February 2, 2012. Taxpayers timely appealed the audits and the matter proceeded to the Formal Hearing.
2. The amount of the audit deficiency as shown on the Notices are as follows:

	Tax	Penalties	Interest ¹	Total as of Date of Notice
2004	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2005	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2006	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
2009	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$

3. The audits for each year at issue are non filing assessments as the Taxpayers had not filed a Utah return for any of these years. A 10% Failure to file and a 10% failure to pay penalty was assessed Under Utah Code Sec. 59-1-401 for each year at issue in this appeal. The Division did not object to waiver of the penalties assessed in this matter.

4. The Taxpayers had not filed Utah Individual Income Tax Returns for any of the years at issue in this appeal under the assertion that Taxpayer TAXPAYER-2 was not a resident of Utah. The Taxpayers acknowledge that TAXPAYER-1 was a Utah resident. She and the couples' children resided at a residence in Utah during the audit years. It was the Taxpayers position that TAXPAYER-2 was not a resident of Utah, and was instead of resident of STATE-1 for the years 2004, 2005 and 2009. They assert that he was a resident of STATE-2 for 2006.

5. The Taxpayers had purchased a home in CITY-1, Utah in 1999. This is the home at which TAXPAYER-1 and the children resided during the years at issue. They had a five year old son and then a second child was born during the audit period.

6. In 2003 TAXPAYER-2 started working for BUSINESS-1 in CITY-2, STATE-1. In 2004 and 2005 he continued to work full time for this BUSINESS-1. He stayed in a bedroom in a boarding house in CITY-2 during the work week. This property had a shared bathroom and kitchen. On weekends and days off he would return to the residence in CITY-1. He would take his belongings with him back to Utah; he did not leave them at the boarding house over the weekends. Although he paid on a monthly basis he would get credit for the days he was not there, so he was basically paying only for the nights that he stayed at this property.

7. Mail for TAXPAYER-2 went to the Utah residence and he filed his federal returns for all of the years at issue using the address of the Utah residence.²

8. Vehicles for both the Taxpayers were registered in Utah during the entire audit period.³ The vehicles were also insured in Utah.

1 These amounts represent the interest and the total as of the date the Notice was issued. Interest continues to accrue on the unpaid balance.

2 Respondent's Exhibits 4 & 5.

3 Respondent's Exhibit 7.

9. TAXPAYER-2 surrendered his Utah Driver License as of November 8, 2005.⁴ He testified that he obtained a STATE-1 Driver License at that time. He then obtained a Utah license again in October 2007. He states he did not register to vote in STATE-1.

10. In 2004 TAXPAYER-2 acquired a Utah Resident Combination hunting license. In 2005 he purchased a Utah Resident license to hunt deer plus a Utah Resident Combination license. In 2006 he did purchase a Utah Nonresident fishing license and Nonresident Small Game license. In 2009 he purchased a Nonresident 1-day fishing license.⁵

9. TAXPAYER-2 testified that TAXPAYER-1 refused to move to STATE-1 with the children. In 2006 he had found employment in STATE-2, at a BUSINESS-2 located near CITY-3. He stated that TAXPAYER-1 was more willing to move to STATE-2 so they had thought about moving the family there. He worked in STATE-2 for most of 2006 and stayed at housing provided by the employer. These were single wide trailers parked side to side. It was a situation where there was shared bathroom and shared kitchen facilities. At this job he would work 28 days and then have 14 days off. He would return to the Utah residence for his days off. This job did not work out and TAXPAYER-1 never actually moved to STATE-2 with the children, nor did TAXPAYER-2 have more permanent living accommodations in STATE-2. TAXPAYER-2 returned to Utah for 2007. In 2007 and 2008 he worked in Utah. This was for the same employer he had worked for in STATE-1, but the employer had a contract assignment with BUSINESS-3. The Taxpayers filed Utah Resident Returns for both 2007 and 2008. These two years are not at issue in this proceeding.

10. In 2009 he started working in STATE-1 again for BUSINESS-1. This time from February 2009 to September 2009 he mostly stayed in a camper trailer that he states he would park in various parking lots. He still had the Utah Driver License. His vehicles were registered and insured in Utah and the Utah address was used for his mail and federal tax returns.

11. TAXPAYER-2 did not abandon his Utah domicile during the years 2004 through 2006 or in 2009. TAXPAYER-2 has not shown a specific intent to abandon the Utah domicile. He had numerous ties to Utah during all of these years which he did not sever. It was in Utah where he owned a home with TAXPAYER-1. In fact, this was his only permanent place of abode during the audit years. He did not even rent an apartment in the other states. TAXPAYER-2 wife and family remained in Utah. His vehicles were registered and insured in Utah. Mail went to the address for his Utah residence. He used the Utah address on tax returns and it was to that address tax documents were mailed. He had a Utah Driver License in 2004 and up through November 8, 2005. He obtained one again in Utah in 2007 and held that license through 2009. Although, TAXPAYER-2 had a physical presence in the other states and

4 Respondent's Exhibit 3.

5 Respondent's Exhibit 8.

was working there full time, he did not establish intent to remain permanently in either STATE-1 or STATE-2. He never did establish a permanent place of abode in either of these states. He did not purchase a home or even rent a permanent apartment. He stayed in temporary lodgings where he shared kitchen and bathroom facilities during the earlier years. In STATE-1 he would take his belongings with him when he returned home to Utah in 2004 and 2005. The arrangement was similar to a nightly rental. In 2009 he acknowledged that he stayed in his camper in various parking lots most of the time.

12. The Taxpayer testified that it was his understanding if he was out of state more than 6 months per year and did not work in Utah, he would not need to file a Utah return. He testified that he thought this was from the Instruction Booklet with the Utah Return. He also states that he did not seek the advice of an accountant or tax preparer. The Division did not object to the Commission waiving the failure to file and failure to pay penalties assessed in this appeal.

APPLICABLE LAW

Utah imposes income tax on individuals who are residents of the state, in Utah Code Sec. 59-10-104(1) (2009)⁶ as follows:

...a tax is imposed on the state taxable income, as defined in Section 59-10-112, of every resident individual...

Resident individual is defined in Utah Code Sec. 59-10-103(1)(q) (2009) as follows:

(q)(i) "Resident individual" means:

(A) an individual who is domiciled in this state for any period of time during the taxable year, but only for the duration of such period during which the individual is domiciled in this state; or

(B) an individual who is not domiciled in this state but: (I) maintains a permanent place of abode in this state; and (II) spends in the aggregate 183 or more days of the taxable year in this state.

(ii) For purposes of this Subsection (1)(v)(i)(B), a fraction of a calendar day shall be counted as a whole day.

For purposes of determining whether an individual is domiciled in this state the Commission has defined "domicile" in Utah Administrative Rule R865-9I-2⁷ as follows:

(A) Domicile

1. Domicile is the place where an individual has a permanent home and to which he intends to return after being absent. It is the place at which an individual has voluntarily fixed his habitation, not for a special or temporary purpose, but with the intent of making a permanent home.

⁶ The Utah Individual Income Tax Act has been revised and provisions renumbered during the audit period although the law as it relates to the issues in this appeal remained substantially the same for the years 2004, 2005, 2006 and 2009. For convenience the Commission cites to the 2009 provisions.

⁷ In 2011 the Utah Legislature substantially revised the provisions of the Utah Code regarding domicile, adopting Utah Code 59-10-136. These revisions are significant and this decision, therefore, should not be considered to provide guidance for tax year 2011 and later years.

2. For purposes of establishing domicile, an individual's intent will not be determined by the individual's statement, or the occurrence of any one fact or circumstance, but rather on the totality of the facts and circumstances surrounding the situation.

(a) Tax Commission rule R884-24P-52, Criteria for Determining Primary Residence, provides a non-exhaustive list of factors or objective evidence determinative of domicile.

(b) Domicile applies equally to a permanent home within and without the United States.

3. A domicile, once established, is not lost until there is a concurrence of the following three elements:

(a) a specific intent to abandon the former domicile;

(b) the actual physical presence in a new domicile; and

(c) the intent to remain in the new domicile permanently.

4. An individual who has not severed all ties with the previous place of residence may nonetheless satisfy the requirement of abandoning the previous domicile if the facts and circumstances surrounding the situation, including the actions of the individual, demonstrate that the individual no longer intends the previous domicile to be the individual's permanent home, and place to which he intends to return after being absent.

. . .

The applicable statutes specifically provide that the taxpayer bears the burden of proof in proceedings before the Tax Commission. Utah Code Sec. 59-1-1417 provides:

In a proceeding before the commission, the burden of proof is on the petitioner. . .

The Tax Commission has authority to waive penalties under Utah Code Sec. 59-1-401(13) which provides:

Upon making a record of its actions, and upon reasonable cause shown, the commission may waive, reduce, or compromise any of the penalties or interest imposed under this part.

CONCLUSIONS OF LAW

1. The issue in this appeal is whether TAXPAYER-2 was a "resident individual" in the State of Utah for the purposes of Utah Code Sec. 59-10-104 for the audit years at issue, or whether he was domiciled in STATE-1 or STATE-2. From the evidence indicated in the finding above, TAXPAYER-2 did not spend in the aggregate more than 183 days per year in Utah during any of these years. A resident individual, in the alternative, is one who is "domiciled" in the State of Utah. See Utah Code Sec. 59-10-103.

2. The question of whether one establishes or maintains a domicile in Utah is a question of fact. The Commission has considered this issue in numerous appeals and whether someone is a "resident

individual” for state tax purposes has been addressed by the appellate courts in Utah.⁸ As discussed by the courts in considering this issue, the fact finder may determine intent “based on the ‘totality of the facts and circumstances surrounding the situation,’ and the taxpayer’s statement of intent is only one factor of many to be considered. ‘In determining whether a party has established a Utah domicile, the fact finder may accord the party’s activities greater weight than his or her declaration of intent.’” *Benjamin v Utah State Tax Comm’n*, 250 P.3d 39, 2011 UT 14, 22 (Utah 2011) citing *Clements*, 893 P.2d at 1081 (citing *Allen v Greyhound Lines, Inc.*, 583 P.2d 613 (Utah 1978)). In this matter it is the Taxpayer’s statement that he changed his domicile but the totality of facts do not support this contention.

3. In this case there is no dispute that the Taxpayer had been domiciled in Utah. Once domicile has been established in Utah three things must be shown to establish a new domicile: 1) a specific intent to abandon the former domicile; 2) the actual physical presence in a new domicile; and 3) the intent to remain in the new domicile permanently. See Utah Admin. Rule R865-9I-2. The Taxpayer has the burden of proof in this proceeding under Utah Code Sec. 59-1-1417. Although there was a physical presence in the other states and the Division did not refute the Taxpayer was working full time in those states, the Taxpayer has not shown that he had the intent to abandon his Utah domicile or that there was the intent to remain in the new domicile permanently. He retained numerous and significant ties to Utah including the only permanent place of abode that he had during this period, which was also the domicile of his spouse and minor children,⁹ and he never took steps to establish a permanent place of abode in the new states.

4. The Tax Commission has authority to waive penalties under Utah Code Sec. 59-1-401(13) if reasonable cause is shown. It is clear for the audit years this Taxpayer was working outside of Utah and the income that he earned was from that out of state employment. The Taxpayer had the misunderstanding that if he was not present in the state more than six months he was not a resident. He did in fact obtain a STATE-1 Driver License for one of the years and a nonresident fishing license. The Division was not objecting to waiver of the penalties and the Commission has recognized in prior

⁸ The issue of domicile for Utah individual income tax purposes has been considered by the Utah Supreme Court and the Court of Appeals in the following cases: *Benjamin v Utah State Tax Comm’n*, 250 P.3d 39, 2011 UT 14 (Utah 2011). *Lassche v. State Tax Comm’n*, 866 P.2d 618 (Utah Ct. App. 1993); *Clements v. State Tax Comm’n*, 839 P.2d 1078 (Utah Ct. App. 1995), *O’Rourke v. State Tax Comm’n*, 830 P.2d 230 (Utah 1992), and *Orton v. State Tax Comm’n*, 864 P.2d 904 (Utah Ct. App. 1993).

⁹ During the audit years at issue, it was possible under the law for one spouse to be domiciled outside Utah and one to be domiciled within Utah, if the one spouse met the test of actually abandoning domicile in Utah and proving the intent to establish a permanent domicile in the new state. The 2011 statutory revisions substantially changed this area of the law with the enactment of Utah Code Sec. 59-10-136. This decision should not be viewed as guidance for tax years 2011 forward.

hearings that this is a difficult area of law and waived penalties. Therefore, the late filing and late payment penalties should be waived in this appeal. There was no basis for waiver of interest.

Considering the foregoing Findings of Fact and Conclusions of law the audits against the Taxpayers should be sustained as to the tax and interest, the penalties should be waived.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission sustains the Utah Individual Income Tax audit deficiencies against the Taxpayers as to the tax and interest for the years 2004, 2005, 2006 and 2009 but waives the late filing and late payment penalties. It is so ordered.

DATED this _____ day of _____, 2014.

R. Bruce Johnson
Commission Chair

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63G-4-302. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §59-1-601 et seq. and §63G-4-401 et seq.